

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

IN RE:	:	Bankruptcy No. 13-20842-CMB
WILLIAM JOHN MONSOUR,	:	
	:	Adversary No. 15-2039-CMB
Debtor.	:	
<hr/>	:	Chapter 11
WILLIAM JOHN MONSOUR,	:	
	:	Hearing Date:
Plaintiff,	:	
	:	Hearing Time:
vs.	:	
	:	Response Date:
WELLS FARGO BANK and	:	
PNC BANK,	:	
	:	
Defendants.	:	
<hr/>	:	
WELLS FARGO BANK,	:	
	:	
Movant,	:	
vs.	:	
	:	
WILLIAM JOHN MONSOUR,	:	
	:	
Respondent.	:	

MOTION OF WELLS FARGO BANK TO DISMISS ADVERSARY COMPLAINT

Wells Fargo Bank, (hereinafter “Wells Fargo”), by and through its attorneys, Phelan Hallinan Diamond & Jones, LLP, files a Motion to Dismiss Adversary Complaint, and in support thereof avers as follows:

FIRST COUNT-IMPROPER SERVICE

1. As documented by the certificate of service filed at docket number 4, the Plaintiff attempted to make service by mailing a copy of the Summons and Complaint to Wells Fargo, without naming an officer or other agent authorized to receive service of process.

2. Plaintiff's attempted service did not comply with the requirements of Bankruptcy Rule 7004(b)(3) and service therefore was ineffective.

3. The summons expired fourteen days after its issuance, pursuant to Bankruptcy Rule 7004(e).

SECOND COUNT-FAILURE TO STATE A CLAIM

4. Wells Fargo is the holder of a mortgage on the property located at 209 Glen Forest Drive, a/k/a 1052 Dearborn Circle, Greensburg, PA 15601 ("the Property").

5. On or about August 29, 2002, William J. Monsour, ("the Debtor"), and his then wife, Sandra L. Behe, executed a Note and Mortgage, granting Wells Fargo a mortgage lien on the Property. Copies of the Note and Mortgage are attached hereto as Exhibits "A" and "B".

6. After a 2009 foreclosure action was resolved, the loan again became delinquent and on March 1, 2012, a Complaint in Mortgage Foreclosure was filed in the Court of Common Pleas of Westmoreland County, PA at case number 1343 of 2012.

7. As required by the Pennsylvania Rules of Civil Procedure, Rule 1144, the Debtor and Sandra L. Behe are named as Defendants in the foreclosure action. A copy of the Complaint is attached hereto as Exhibit "C".

8. Upon being served with the foreclosure Complaint, the Debtor and Sandra L. Behe obtained counsel and filed an Answer to the Complaint on December 12, 2013. A copy of the Answer is attached hereto as Exhibit "D".

9. On February 27, 2013, Wells Fargo filed a Motion for Summary Judgment. On February 28, 2013, the Debtor commenced the Chapter 11 Bankruptcy and the foreclosure action was put on hold.

10. Since the foreclosure action was initiated, Wells Fargo has maintained insurance on the Property and has paid the real estate taxes.

11. Since the abandonment Order was entered in the bankruptcy action, Wells Fargo has secured the property and has expended funds to maintain and preserve the property.

12. Wells Fargo has made the Court of Common Pleas of Westmoreland County, Pennsylvania aware that the Property has been abandoned by the Debtor in the Bankruptcy proceeding and that there is no longer a stay on the foreclosure action. Counsel for Wells Fargo is awaiting a scheduling Order on the pending Motion for Summary Judgment.

13. Wells Fargo cannot control the scheduling of the Motion for Summary Judgment by the Court of Common Pleas of Westmoreland County, Pennsylvania.

14. The Debtor has many options that will speed up the process of bringing the Property to Sheriff's Sale. The Answer to the Complaint can be withdrawn. The defendants can consent to judgment or they can simply not oppose the Motion for Summary Judgment.

15. Wells Fargo cannot accept a deed in lieu of foreclosure because PNC Bank holds a second mortgage on the Property.

16. The Adversary Complaint fails to state a claim upon which relief can be granted. The Bankruptcy Court has no authority to require Wells Fargo to satisfy a joint mortgage where an active foreclosure is pending in the state court and the co-borrower on the Note has not been released.

17. The facts upon which the Complaint are founded are incorrect. Wells Fargo has secured and preserved the Property and an active state court foreclosure action is pending.

COUNT THREE-FAILURE TO JOIN A PARTY

18. Sandra L. Behe is a borrower on the Note, a mortgagor and a necessary party to the foreclosure action under the Pennsylvania Rules of Civil Procedure.

19. Sandra L. Behe has not been named as a plaintiff or a defendant in this action and is a necessary party to the case.

WHEREFORE, Wells Fargo Mortgage, respectfully requests that this Honorable Court dismiss the Plaintiff's Complaint to Enforce Confirmed Plan, with prejudice.

Respectfully submitted,

PHELAN HALLINAN
DIAMOND & JONES, LLP

Date: March 27, 2015

/s/ James A. Prostko, Esquire
James A. Prostko, Esquire
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Phelan Hallinan Diamond & Jones, LLP
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Defendants.	:	
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WELLS FARGO BANK,	:	
	:	
Movant,	:	
vs.	:	
	:	
WILLIAM JOHN MONSOUR,	:	
	:	
Respondent.	:	

CERTIFICATE OF SERVICE

I certify under penalty of perjury on the dates stated below I served or caused to be served Wells Fargo Mortgage's Motion to Dismiss Plaintiffs' Complaint and proposed Order, on the parties at the addresses shown below. The types of service made on the parties were: Electronic Notification and First Class Mail.

Service by Electronic Notification

DONALD R. CALAIARO
CALAIARO VALENCIK
428 FORBES AVE, SUITE 900
PITTSBURGH, PA 15219
DCALAIARO@C-VLAW.COM

NORMA HILDENBRAND, ESQUIRE C/O OFFICE OF THE
UNITED STATES TRUSTEE
OFFICE OF THE UNITED STATES TRUSTEE
SUITE 970 LIBERTY CENTER
1001 LIBERTY AVENUE
PITTSBURGH, PA 15222
EMAIL: NORMA.L.HILDENBRAND@USDOJ.GOV

Date: March 27, 2015

Service by First Class Mail

WILLIAM JOHN MONSOUR
725 SHAWNEE LANE
LIGONIER, PA 15658

PHELAN HALLINAN
DIAMOND & JONES, LLP

/s/ James A. Prostko, Esquire

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